



November 2012
AK Position Paper

Draft Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM 2012)372 finalC

About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator. All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community- and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Herbert Tumpel
President

Werner Muhm
Director

The AK position in detail

The BAK welcomes the initiative of the EU-Commission to introduce a harmonized framework for collecting societies in order to achieve transparency and improve their management and supervision bringing about at least minimal harmonisation in this complex legal area.

From a consumers' point of view – who in the last stance has to bear the cost of licences and statutory remuneration claims (as for example the copying fee) – it is adamant that collecting societies work efficiently and transparently with regard to their tariff fixing and the management of royalties. In future, all relevant activities, that is fixing of tariffs, management and distribution of royalties and the legal position of creative with respect to the collecting societies shall be subject to the control by a regulatory authority. The relevant framework has to be set by law.

From the BAK's point of view, the present legal framework as to authors' rights in the widest sense is more and more lagging behind the development of digital society causing undesired imbalances at the expense of prosumers' and consumers. The latter are increasingly confronted with claims of collecting societies, publishing and film producing companies, the substance of which can often be clarified only by burdensome courts procedures.

Up to now, questions arising from digital technologies and their impact on users handling are only considered

under the aspect of piracy. Important users requests, as for example the right for digital private copies or consumers rights which go without saying with regard to physical goods, remain unheard. This causes a distorted balance of interests not only to the detriment of consumers/prosumers but also of creatives.

Finally, due to the technological development, the current EU-framework is characterized by many unanswered questions which also involve fundamental rights of users of the internet: As for example the project of collecting societies and rightholders to oblige internet providers to provide data about users' activities with copyright implications. Such attempts endanger the EU standard of fundamental rights. Therefore, the BAK pronounced manifold warnings relating to the "three strikes out" initiatives and the conclusion of ACTA-Treaty.

Having said this, we consider the present draft directive as a positive first step to introduce better regulation and transparency for collecting societies, not being the right holders but the creators' trustees, supposed to collect and distribute royalties efficiently. We highly appreciate that the EU-Commission addresses the problem of disparity of market power between collecting authorities, being vested with a legal monopoly, on the one side and mostly individually acting creatives on the other.

However, BAK deplores that

- only commercial users and not consumers/prosumers are considered as counterpart of collecting societies, although it is the consumers only, who in practice bear the cost for licensing and statutory remuneration claims like the private copying levy.

Moreover, according to our experience post-control by boards of arbitration, independent authorities or civil courts do not suffice to provide for efficient management of collecting rights.

- the BAK strongly endorses a preventive control by installing the obligation of ex-ante authorization especially for bylaws, provision as to the distribution of collected royalties and fixing of tariffs by a regulatory authority as already established e.g. in the telecom sector. A first such approach has been undertaken by Germany, although the system seems still widely unsatisfactory due to the weakness of controlling powers (as expressed in the interview with the German regulatory authority relation to GEMA, see Berliner Zeitung of 20.08.2012; <http://www.berliner-zeitung.de/kultur/wer-ueberwacht-die-gema---wir-haben-keine-beanstandung-en,10809150,16925416.html>).

Finally, to BAK's point of view

- the current draft provisions relating to democracy within collecting

societies fail to go into sufficient depth. A two-tier society according to income or length of membership is no appropriate approach in particular with a view to the pure fiduciary management of copyrights by collecting societies. Voting and pre-emptive rights, that is the rights for democratic participation, have to be the same for all members. Therefore, the possibility of opting-out offered by the EU-Commission with regard to this subject matter (see art 7 al 5 lit b and art 7 al 4 second paragraph) should be withdrawn.

In conclusion, we think that the EU-Commission's proposal is a very important step towards the introduction of transparency and equal treatment, not only within the collecting societies, but also with regard to the social and cultural funds established by them. We also welcome the EU-Commission's attempt to improve the system of cross-border management of collective rights with regard to the online-sector and to foster legal offers of music services. However, further, more decisive steps need to be undertaken with a view to adapt legal provisions suitable for the new digital world. Therefore, we ask you, dear Member of the European Parliament, to support BAK's proposed amendments in order to achieve a level playing field between consumers/prosumers, creatives and gatekeepers (collecting societies, production and publishing companies by

- giving consumers/prosumers a negotiation voice represented by the regulatory authority

- establishing a regulatory system as in sectors with comparable monopoly structures
- endowing creatives with equal democratic participation rights towards collecting societies.

Inclusion of consumers' interests

BAK kindly requests you, dear Member of the Parliament, to advocate for the amendment of the Directive accordingly. To this end, we propose draft amendments to articles 15 and 35, enclosed in the Annex.

Internal Management and regulation

BAK calls on you, dear Member of the Parliament, to advocate for the corresponding amendment of the directive. To this end we propose the draft amendments relating to articles 7, 8, 9, 12, 19 and Annex I point 3 of the draft regulation as enclosed in the Annex.

Democracy within collecting societies

Accepting the establishment of two-tier societies within the collecting societies by creating two categories of membership is unacceptable from a democratic point of view. This is even more valid in the case of monopolistic structures, typical for the sector in question. BAK therefore asks you, dear Member of the Parliament, to advocate for the draft amendments as proposed in Annex I relating to articles 5, 6 and 7.

We kindly request you, dear Member of the Parliament, to support the proposed amendments of the draft Directive in order to achieve a level playing field between rightholders' and consumers'/prosumers' in the digital world. Should any further questions occur, please, refer to Susanne Wixforth (susanne.wixforth@akwien.at) or Sonja Auer-Parzer (sonja.auer@akwien.at).

Yours faithfully

Herbert Tumpel
President

Günther Chaloupek
on behalf of the director general

Annex I: Draft amendments

ANNEX I

Draft Amendments

Article 5 - Rights of rightholders

European Commission

Amendment Application

...

3) Rightholders shall have the right to terminate the authorisation to manage rights, categories of rights or types of works and other subject matter granted to a collecting society or to withdraw from a collecting society any of the rights or categories of rights or types of works and other subject matter of their choice, for the Member States of their choice, upon serving reasonable notice not exceeding six months. The collecting society may decide that such termination or withdrawal will take effect only at the middle and at the end of the financial year, whichever is sooner after the expiry of the notice period.

...

3.) Rightholders shall have the right...

...The collecting society **has to accept** such termination or withdrawal **by the quarter** of the financial year. *(delete)*.

...

...

Reason:

The provisions for the termination of the contract between collecting societies and creative as foreseen by the proposal lead to unnecessary long commitment and waiting periods for the latter – up to one year. Therefore we propose the right for termination every quarter of a year.

Article 6 - Membership rules of collecting societies

European Commission

Amendment Application

...

3) The statute of the collecting society shall provide for appropriate and effective mechanisms of participation of its members in the collecting society's decision making process. The representation of the different categories of members in the decision making process shall be fair and balanced.

...

3.) The statute of the collecting society shall provide for appropriate and effective mechanisms of participation of its members in the collecting society's decision making process. **All members are endowed with an active and passive voting right within the general meetings.** The representation of the *(delete)* members in the decision making process shall

...

be fair and balanced. ***In the executive bodies (board and management) the members shall be represented according to the different professional groups within the collecting society.***

...

Reason:

The distinction between different categories of members (such with and without voting rights) is not acceptable - neither from a democratic point of view nor with regard to the monopolistic structure and market power of collecting societies. The distinction brings about discriminatory practices only to be combated in time consuming procedures. Finally, a distinction between different categories of members cannot be argued on the basis of efficiency necessities, but are rather an excuse to restrict participation rights mainly of young creatives.

Article 7 - General meeting of members of the collecting society

Proposal by the European Commission

Amendment Application

1. Member States shall ensure that the general meeting of the members of the collecting societies is organised according to the rules laid down in paragraphs 2 to 8.

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2. A general meeting of the members of the collecting society shall be convened at least once a year.

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3. The general meeting shall approve any amendments to the statute and the membership terms of the collecting society, where those terms are not regulated by the statute.

3. The general meeting shall approve any amendments to the statute and the membership terms. ***(delete)***

4. The general meeting shall have the power to decide on the appointment or dismissal of the directors and approve their remuneration and other benefits such as nonmonetary benefits, pension awards, right to other awards and rights to severance pay. The general meeting shall not decide on the appointment or dismissal of members of the management board or the individual managing director where the supervisory board has the power to appoint or dismiss them.

4. The general meeting shall have the power to decide on the appointment or dismissal of the directors and approve their remuneration and other benefits such as nonmonetary benefits, pension awards, right to other awards and rights to severance pay. ***(delete)***

5. In accordance with the provisions laid down in Chapter 2 of Title II, the general meeting shall, at least, take decisions on the following issues:

- (a) the policy on the distribution of the amounts due to rightholders, except where the general meeting decides to delegate this decision to the body exercising the supervisory function;
- (b) the use of the amounts due to rightholders which cannot be distributed as set out in Article 12(2) except where the general meeting decides to delegate this decision to the body exercising the supervisory function;
- (c) the general investment policy, including on granting loans or providing security or guarantee for loans, with regard to rights revenue;
- (d) the rules on deductions from rights revenue.

6. The general meeting shall control the activities of the collecting society by, at least, deciding on the appointment and removal of the auditor and approving the annual transparency report and the auditor's report.

5. In accordance with the provisions laid down in Chapter 2 of Title II, the general meeting shall, at least, take decisions on the following issues:

- (a) the policy on the distribution of the amounts due to rightholders, ***(delete)***

- (b) the use of the amounts due to rightholders which cannot be distributed as set out in Article 12(2) ***(delete)***

- (c) the general investment policy, including on granting loans or providing security or guarantee for loans, with regard to rights revenue;

- (d) the rules on deductions from rights revenue.

(e)(new) the statutes of the collecting society

(f) (new) the distribution rules for the collected royalties

(g) (new) the admission and termination rules for membership

(h) (new) the rules concerning the management of the social and cultural funds

5(a) (new) The rules adopted by the general meeting under article 7 (5) have to be approved by the competent authority according to article 37 in order to be applicable.

6. The general meeting shall control the activities of the collecting society by, at least, deciding on the appointment and removal of the auditor and approving the annual transparency report and the auditor's report. ***The members or their proxies have the right to appoint an auditing committee or to endow an external auditor with controlling tasks in case of reasonable doubts about the financial management of the collecting society. The result of this auditing has to be reported to the competent authority which will***

7. Any restriction on the right of the members of the collecting society to participate and to exercise voting rights at the general meeting shall be fair and proportionate and be based on the following criteria:

- (a) duration of membership;
- (b) amounts received or due to a member in relation to the specified financial period. These criteria shall be included in the statute or the membership terms of the collecting society and shall be made publicly available in accordance with Articles 17 and 19.

8. Every member of a collecting society shall have the right to appoint any other natural or legal person as a proxy holder to attend and vote at the general meeting in his name.

undertake the appropriate procedures according to national law in order to provide for the necessary remedies.

7. (delete whole article)

8. Every member of a collecting society shall have the right to appoint any other natural or legal person as a proxy holder to attend and vote at the general meeting in his name.

Reason:

All legal provisions concerning the most important management decisions must be adopted by the representative body of the creatives, that is the general meeting. With regard to the special mission of collective societies, being a trustee of all creatives and deriving its income solely from royalties belonging to these creatives, any transfer of powers of decision relating to the legal position of creatives must be rejected.

Finally, as already pointed out under article 6, from a democratic point of view, restrictions to voting rights or a distinction between more and less privileged members creates a two tier society which is unacceptable.

Article 8 - Supervisory function

European Commission

1. Member States shall ensure that the collecting society establishes a supervisory function responsible for continuously monitoring the activities and the performance of the duties of the persons entrusted with managerial responsibilities in the collecting society. There shall be fair and balanced representation of the members of the

Amendment Application

1. Member States shall ensure that the collecting society establishes a supervisory function responsible for continuously monitoring the activities and the performance of the duties of the persons entrusted with managerial responsibilities in the collecting society...

collecting society in the body exercising this function in order to ensure their effective participation.

2. The body entrusted with the supervisory function shall meet regularly and shall have at least the following powers:

(a) to approve any acquisition of immovable property by the collecting society;

(b) to approve the setting-up of subsidiaries, acquisitions of other entities, acquisitions of shares or rights in other entities, mergers and alliances;

(c) to approve the taking-out of loans, granting of loans and provision of security or guarantee for loans.

3. Member States may decide that paragraphs 1 and 2 shall not apply to a collecting society which on its balance sheet date does not exceed the limits of two of the three following criteria:

(a) balance sheet total: EUR 350 000;

(b) net turnover: EUR 700 000;

(c) average number of employees during the financial year: ten.

2. The body entrusted with the supervisory function shall meet regularly and shall have at least the following powers:

(a) ***(delete)***

(b) to approve the setting-up of subsidiaries, acquisitions of other entities, acquisitions of shares or rights in other entities, mergers and alliances;

(c) to approve the taking-out of loans, granting of loans and provision of security or guarantee for loans.

3. ***(delete)***

Reason:

The only reason for the establishment of collecting societies and transferring special (monopolistic) powers on them is to collect royalties and to distribute them to the creative, who entrusted them with this task. By no ways, collective societies should be involved in additional financial transaction, least in speculative investments. Therefore we plead for the abolishment of the respective provision.

Moreover, the BAK is of the opinion that any collecting society entrusted with the management of creatives' rights must be subject to the present directive. Introducing thresholds opens the possibility for regulatory arbitrage and hence should be rejected.

Article 9 - Obligations of the persons who effectively manage the business of the collecting society

European Commission

Amendment Application

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2. Member States shall ensure that the persons who effectively manage the business of a collecting society

and its directors, with the exception of the directors exercising supervisory function, design procedures so as to avoid conflicts of interest. The collecting society shall have procedures to identify, manage, monitor and disclose conflicts of interest in order to prevent them from adversely affecting the interests of members of the society. Those procedures shall include an annual individual statement by each of those persons and directors, to the body entrusted with the supervisory function, containing the following information:

...

...

Those procedures shall include an annual individual statement by each of those persons and directors, to the body entrusted with the supervisory function **as well as publication in the annual report of the collecting society**, containing the following information:

...

Reason:

For transparency reasons the statements should be also available to the members who eventually are the trustees of the collecting societies' management.

Article 12 - Distribution of the amounts due to rightholders

European Commission

Amendment Application

1. Member States shall ensure that the collecting society regularly and diligently distributes and pays amounts due to all rightholders it represents. The collecting society shall carry out such distribution and payments no later than 12 months from the end of the financial year in which the rights revenue was collected, unless objective reasons related in particular to reporting by users, the identification of rights, rightholders or to the matching of information on works and other subject matter with rightholders prevent the collecting society from respecting this deadline. The collecting society shall carry

1. Member States shall ensure that the collecting society regularly and diligently distributes and pays amounts due to all rightholders it represents. The collecting society shall carry out such distribution and payments no later than **3 months from the point of time** in which the rights revenue was collected, unless objective reasons related in particular to reporting by users, the identification of rights, rightholders or to the matching of information on works and other subject matter with rightholders prevent the collecting society from respecting this deadline. The collecting society shall carry out such distribution and payments

out such distribution and payments accurately, ensuring equal treatment of all categories of rightholders.

...

accurately, ensuring equal treatment of all categories of rightholders.

In case of dispute the competent authority has to decide on the amount of royalties to be paid to the rightholder.

...

Reason:

This article refers to the transfer of royalties to the rightholders. Taking into consideration that royalties represent their lifetime income, and bearing in mind that the collecting societies are only trustees of the creatives, we plead for the radical cut-back of the payout period. In addition, this is also necessary for the sake of transparency, as disbursements concerning royalties for activities lying more than one year back in the past are difficult to comprehend.

Article 15 - Licensing

European Commission

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2. Licensing terms shall be based on objective criteria, in particular in relation to tariffs. Tariffs for exclusive rights shall reflect the economic value of the rights in trade and of the service provided by the collecting society. In the absence of any national law which establishes the amounts due to rightholders in respect of a right to remuneration and a right to compensation, the collecting society shall base its own determination of those amounts due, on the economic value of those rights in trade.

3. Collecting societies shall allow users to communicate by electronic means, including, when appropriate, for the purpose of reporting on the use of the licence.

Amendment Application

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2. Licensing terms shall be based on objective criteria, in particular in relation to tariffs. Tariffs for exclusive rights shall reflect the economic value of the rights in trade and of the service provided by the collecting society. In the absence of any national law which establishes the amounts due to rightholders in respect of a right to remuneration and a right to compensation, the collecting society shall base its own determination of those amounts due, on the economic value of those rights in trade. ***Tariffs, underlying calculation criteria and the right for compensation have to be approved by the competent authority in accordance with article 37.***

3. Collecting societies shall allow users to communicate by electronic means, including, when appropriate, for the purpose of reporting on the use of the licence.

Reason:

The settlement of tariffs by two contracting parties at the expense of a third party, namely the consumers, not being involved in the negotiations, does not comply with the requirements of the digital society and the multiple ways of exploitation. In order to avoid the current burdensome court procedures, the efficiency of tariffing can be considerably improved by shifting this task to a regulatory authority, which has to find the balance between economic value and fair compensation for the exploitation of copyrights in the digital world.

Article 19 – Disclosure of information to the public

European Commission

1. Member States shall ensure that a collecting society makes public the following information:

- (a) the statute;
- (b) the membership terms and terms of termination of the authorisation to manage rights, if not included in the statute;
- (c) the list of the persons referred to in Article 9;
- (d) rules on distribution of the amounts due to rightholders;
- (e) rules on management fees;
- (f) rules on deductions from rights revenue for purposes other than management fees, including deductions for the purposes of social, cultural and educational services;
- (g) complaint handling and dispute resolution procedures available in accordance with Articles 34, 35 and 36.

...

Amendment Application

1. Member States shall ensure that a collecting society makes public the following information:

- (a) the statute;
- (b) the membership terms and terms of termination of the authorisation to manage rights, if not included in the statute;
- (c) the list of the persons referred to in Article 9;
- (d) rules on distribution of the amounts due to rightholders;
- (e) rules on management fees;
- (f) rules on deductions from rights revenue for purposes other than management fees, including deductions for the purposes of social, cultural and educational services;
- (g) complaint handling and dispute resolution procedures available in accordance with Articles 34, 35 and 36.

(h)(new) tariffs fixed by negotiations after approval by the competent authority

(i)(new) autonomous tariffs, that is tariffs published by the collecting society in case negotiations with users failed after approval by the competent authority

1(a)(new) In case of violation of the publication obligation as set down in article 19 (1) the Member State has to provide for efficient and dissuasive sanctions.

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Reason:

Experience shows that publication obligations lacking consecutive sanctions remain toothless. We think that transparency must also comprise the tariffs applicable. Moreover, in order to ensure compliance with the European Court's decisions as to the notion of fair compensation and minimal harm it is necessary to introduce the control by a regulatory authority.

Article 20 - Annual transparency report

European Commission

Amendment Application

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5. Member States may decide that points 1 (a), (f) and (g) of Annex I shall not apply to a collecting society which on its balance sheet date does not exceed the limits of two of the three following criteria:

- (a) balance sheet total: EUR 350 000;
- (b) net turnover: EUR 700 000;
- (c) average number of employees during the financial year: ten.

...

(delete)

Reason: *see article 8*

Article 35 - Dispute resolution for users and consumers

European Commission

Amendment Application

1. Member States shall ensure that disputes between collecting societies and users concerning existing and proposed licensing conditions, tariffs, and any refusal to grant a licence can be submitted to a court, and if appropriate, to an independent and impartial dispute resolution body.

2. Where the obligation set out in paragraph 1 is implemented by recourse to an independent and impartial dispute resolution body, this shall not prevent the parties from asserting and defending their rights by bringing an action before a court.

1. Member States shall ensure that disputes between collecting societies, **(delete)** users **and consumers** concerning **the foundation of the claims**, existing and proposed licensing conditions, tariffs, and any refusal to grant a licence can be submitted to **the competent authority**.

2. Where the obligation set out in paragraph 1 is implemented by recourse to **the competent authority**, this shall not prevent the parties from asserting and defending their rights by bringing an action before a court.

Reason:

BAK strongly promotes the idea of subjecting collecting societies under a regulatory regime including ex-ante authorisation for certain activities, as the implementation of distribution rules etc (s. amendment to articles 7 and 15). Therefore, we propose to pool all decisions concerning copyright exploitation in the widest sense at the competent authority, as it is the case for example in the comparable telecom sector.

Article 39 - Competent authorities

European Commission

Member States shall notify the Commission of the competent authorities referred to in Articles 21, 37, 38 and 40 by the [date]. The Commission shall make that information available on its website.

Amendment Application

Member States shall notify the Commission of the competent authorities referred to in Articles **7, 12, 15, 19, 21, 35, 37, 38** and 40 by the [date]. The Commission shall make that information available on its website.

Reason: *see article 35*

Annex I

European Commission

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3. Information to be provided in the special report referred to in Article 20(3):
 (a) the amounts collected for the purposes of social, cultural and educational services in the financial year, with a breakdown per category of rights managed and per type of use;
 (b) the explanation of the use of those amounts, with a breakdown per type of purpose.

Amendment Application

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3. Information to be provided in the special report referred to in Article 20(3):
 (a) the amounts collected for the purposes of social, cultural and educational services in the financial year, with a breakdown per category of rights managed and per type of use;
 (b) the explanation of the use of those amounts, with a breakdown per type of purpose.
(c) (new) Financial information on the cost of management services

Reason:

With a view to the social priorities of such funds it is adamant to provide for transparency of management cost in order to keep them as low as possible.

Should you have any further questions
please do not hesitate to contact

Susanne Wixforth

T + 43 (0) 1 501 65 2603
susanne.wixforth@akwien.at

and

Sonja Auer

T + 43 (0) 1 501 65 2311
sonja.auer@akwien.at

as well as

Amir Ghoreishi

(in our Brussels Office)
T +32 (0) 2 230 62 54
amir.ghoreishi@akeuropa.eu

Bundesarbeitskammer Österreich

Prinz-Eugen-Strasse, 20-22
A-1040 Vienna, Austria
T +43 (0) 1 501 65-0
F +43 (0) 1 501 65-0

AK EUROPA

Permanent Representation of Austria
to the EU
Avenue de Cortenbergh, 30
B-1040 Brussels, Belgium
T +32 (0) 2 230 62 54
F +32 (0) 2 230 29 73